

OCT 22 1983

No. 83/1794

WILLIAM L. STEVAG,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD J. REGAN,

Petitioner,

vs.

THE TOWN OF BROOKHAVEN,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari

EDWARD J. HART

Attorney for Respondent

124 N. Merrick Avenue

Merrick, NY 11566

(516) 623-1111

CURTIS, HART & ZAKLUKIEWICZ

EDWARD J. HART & BRIAN McELHENNY

On the Brief

Questions Presented.

1. Is petitioner's complaint frivolous and without merit?

Answer—The Court below answered yes and dismissed petitioner's complaint with prejudice.

2. Do the acts complained of constitute a violation of Regan's constitutional rights, privileges or immunities so as to enable him to establish an action under §1983?

Answer—No.

3. Should petitioner's request for a writ of certiorari be granted?

Answer—No.

Table of Contents.

	Page
Questions Presented	i
Statement of the Case	1
Statement of Facts	2
ARGUMENT:	
POINT I. Plaintiff's complaint is frivolous and without merit and should have been dis- missed	5
POINT II. The Court of Appeals decision does not conflict with any holding of this Court	9
Conclusion	11
CASES CITED:	
	Page
Anonymous v. Association of the Bar of City of N.Y., 515 F.2d 427 (1975)	7
Board of Regents v. Roth, 408 U.S. 564, (1972)	7, 9
District Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983)	7
Monell v. Dept. of Social Services, 436 U.S. 658 (1978)	8, 9

	Page
Paul v. Davis, 424 U.S. 693 (1976)	8
Sommer v. Rankin, 449 F. Supp. 66 (1978)	8
Zimmerman v. Grievance Committee of the Fifth Judicial District of the State of New York, 2d Circuit 1984, New York Law Journal, page 1, February 2, 1984	7

STATUTES CITED:

Title 42, §§1983, 1985	1, 4, 5, 9, 10
§691.6 of the Rules of the Appellate Division, Sec- ond Dept.	4, 6
§90(2), Judiciary Law of N.Y.	6
§691.4, Rules of the Appellate Division, Second Dept.	6

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Statement of the Case.

Edward Regan commenced this action in September of 1982 alleging that the Town of Brookhaven had violated §§1983 and 1985 of Title 42 by forwarding a letter to the Suffolk County Bar Association, signed by an Assistant Town Attorney, Sherri Ann Levy, and typed on Town stationery on June 17, 1981.

Depositions and discovery were held in the following year. Edward Regan testified and the Town Attorney and

the Town Supervisor were deposed. Interrogatories were served and answered.

The defendant moved to amend its answer and add the Fifth and Sixth affirmative defenses alleging that the letter from Sherri Ann Levy was not an execution of an official act, regulation, custom, statute, ordinance or policy of the defendant Town, and the sixth defense, that the acts of the Town's agents were performed in good faith.

Plaintiff opposed the amendments and moved to dismiss defendant's second and fourth affirmative defenses based upon subject matter jurisdiction and privilege.

The Court searched the record and dismissed plaintiff's complaint with prejudice after finding it frivolous and without merit on December 8, 1983 (C1-4).

Plaintiff then filed an appeal.

The Court of Appeals for the Second Circuit unanimously affirmed Judge Jacob Mishler's *sua sponte* dismissal of plaintiff's complaint one day after oral argument on March 29, 1984 (A-1, 2).

Petitioner then filed this request for a writ of certiorari.

Statement of Facts.

Edward Regan commenced litigation against the Town of Brookhaven pertaining to the Town's use of Federal Funds to develop property into a playground within the Town of Brookhaven.

Assistant Town Attorney, Sherri Ann Levy, was assigned to handle the defense of that proceeding. During motion

practice, Mr. Edward Regan, an attorney, executed an affidavit stating that Ms. Levy objected to and thought represented objectionable actions and questionable ethics.

She wrote to the Suffolk County Bar Association on June 17, 1981 and expressed her complaint about Mr. Regan, six days after Regan's affidavit was executed. Levy's letter specifically objected to Regan's allegations and "poetry" on page 8 of his affidavit.

Levy thought Regan's affidavit contained a personal attack with a district sexist bias and thinly veiled accusations of perjury. She referred to Regan's affidavit which in part accuses the Town Attorney of bad faith, conflict of interest, misstatements, and stating contradictory things to different Judges. Regan's affidavit states:

"Perhaps, though there is another reason for her reversal, there is an old adage which proclaims, 'convince a woman against her will and she'll have the same opinion still.' "

Levy objected to this material being included in litigation papers and requested an *investigation* of the matter.

Mr. Regan filed his answer and own complaint with the Bar Association dated September 28, 1981.

Ms. Levy filed her answer to Regan's complaint on March 30, 1982. She specifically states that she did not intend to infringe on Regan's rights of free speech and in fact wanted the committee to investigate and advise Regan that inclusion of certain remarks in legal papers was improper.

Town Attorney, Martin Kerins, wrote to the Bar Association on December 4, 1981 advising them that Levy's letter was filed by her without the specific approval or disapproval of the Town.

Kerin's correspondence with Town Supervisor Lefkowitz and Councilman Dooley, shows that the grievance was filed by Levy without any formal position by the Town officials either for or against it. In fact, Kerins testified at his deposition that he knew she was filing the grievance but he did not discuss the exact wording with her or whether she was using Town stationery.

On October 13, 1982, the Grievance Committee of the Tenth Judicial District wrote to Mr. Regan, advising him that Levy's complaint had been dismissed, but advising him to be more courteous and professional in dealing with other attorneys.

On November 4, 1982, the Grievance Committee advised Regan there was no provision for the appeal of a Grievance Committee determination to dismiss a complaint, unlike the provision in §691.6 of the Rules of the Second Department which provide for an appeal by an attorney if a letter of caution or admonition has been issued. Clearly, the Committee did not deem its October 13 letter one of "caution or admonition," merely advice.

Regan had already commenced this lawsuit against the Town alleging violations of §§1983 and 1985, one month prior to the decision of the Grievance Committee.

The Town of Brookhaven fails to see how plaintiff's rights have been infringed or how he has been deprived of a constitutional right, privilege or immunity due to this one letter from Levy.

Regan constantly alleges that he has lost his freedom of speech and various other protections. Clearly, the grievance procedure did not inhibit him from commencing a Federal lawsuit seeking \$60,000,000.

His license to practice law was never acted against, questioned or threatened. Levy asked for an investigation, she did not request that they disbar him.

Mr. Regan has not seen a physician as a result of the incident, and his law practice was losing money from 1979-1981 prior to this incident.

The complaint by Levy was sent only to the Bar Association and Grievance Committee and not to the general public.

ARGUMENT.

POINT I.

Plaintiff's complaint is frivolous and without merit and should have been dismissed.

Plaintiff pleaded that the Town of Brookhaven violated §1983 by infringing upon his right of free speech and counsel of his choice. The action of the Town was alleged to be under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of New York, Town of Brookhaven and County of Suffolk.

Plaintiff further complained that use of Town stationery in the complaint made by Levy involved a cloak of authority and was part of a scheme to deny Regan his constitutional rights and further that he was denied a hearing.

Plaintiff has not lost any rights due to the complaint filed by Ms. Levy. No action was taken by the Grievance Committee and the complaint was not forwarded to the Appellate Division, Second Department which has jurisdiction to discipline attorneys within its jurisdiction pursuant to Part 691 of the Rules of the Second Department and §90(2) of the Judiciary Law of New York. The Appellate Division Rules, §691.4 provide for the investigation of complaints by Grievance Committees for the Second and Eleventh, Ninth and Tenth Judicial Districts.

Section 691.6 of the Rules of the Second Department provide that the chairman of the Committee can privately admonish or issue a letter of caution to an attorney subject to the attorney's right to a hearing.

The grievance or complaint letter filed by Levy was dismissed. The Committee merely requested Regan to be more courteous with other attorneys. There was no appeal from a dismissal of the complaint.

Regan's lawsuit in the Federal Court is a classic example of wasting Court time and expense with a frivolous complaint. He alleges the following rights or privileges were denied by defendant:

free speech, counsel of his choice, right of petition, good reputation, right to practice law, right to a hearing, due process, equal protection, right against unreasonable seizure and the right to confront witnesses against him.

How Regan maintains this one letter of June 17, 1981 denies him these rights is difficult to believe or understand. He is a licensed attorney in New York and nothing

ever occurred in the Grievance Committee to change or question that. It is obvious from this case he still is practicing law and is indeed suing the Town, whom he has accused of intimidation.

Regan has not cited one case in support of his argument that he was entitled to a hearing or any other due process. There is no question of a deprivation of "property" or "liberty" as defined in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The grievance was not publicized, and in fact the request to Mr. Regan to be more courteous supports Levy's complaint.

Surely, Regan is not claiming that an attorney such as Levy does not have the right to file a complaint with the Bar Association. He filed one himself against her.

This Court has recognized in the past, the strong State interest in the integrity, competence and professional standards of members of the bar. This Court has exercised "younger" abstention in allowing State disciplinary procedures to proceed without Federal review. *Anonymous v. Association of the Bar of City of N.Y.*, 515 F.2d 427 (1975).

There is no subject matter jurisdiction in the Federal District Court to review the application of State disciplinary procedures to a particular individual. *District Court of Appeals v. Feldman*, 103 S.Ct. 1303 (1983), *Zimmerman v. Grievance Committee of the Fifth Judicial District of the State of New York*, 2d Circuit 1984, *New York Law Journal*, page 1, February 2, 1984.

Defendant also contends that the complaint of Levy does not constitute action under color of law executing a policy, custom, regulation or ordinance of the Town as required under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Levy's explanation for her complaint, clearly shows she did not file it to execute Town policy or in following any custom or procedure used in the Town. Kerins also advised the Bar Association on December 4, 1981, that her complaint did not have the approval or disapproval of the Town and its elected officials. He testified it was something Ms. Levy felt she should do.

There is no mention of any other grievances being filed against other attorneys, although plaintiff has attempted to show that the firing of a Town employee, Rosenbloom, and the slander suit brought by a citizen (Van Houten), are relevant to this action. There is absolutely no connection. Levy was not involved in either of those cases. Neither involved the filing of a grievance and neither were plaintiffs in litigation against the Town.

Merely because a municipality as large as the Town of Brookhaven is involved in numerous cases in litigation is not unusual, and absent any common factors with the present case, there is nothing to show Town custom or policy. More than a state tort must be shown. *Paul v. Davis*, 424 U.S. 693 (1976). Here, Levy's actions do not establish a state tort.

The Court has both the right and the duty to *sua sponte* dismiss frivolous actions. *Sommer v. Rankin*, 449 F. Supp. 66 (1978).

Plaintiff must allege *facts* which can establish a viable §1983 claim. Here Regan alleges that Levy filed a complaint against him with the Bar Association. There is nothing illegal about filing such a complaint and plaintiff's allegation that this denied him free speech is self-serving, conclusory and frivolous in the face of Levy's explanation and the contents of the letter itself.

Plaintiff must also allege facts showing that official Town policy or custom was the moving force behind the deprivation, and even if the Court considered this a denial of free speech, it is clear Levy's letter was written about an isolated situation between her and a litigant rather than an expression of Town policy. She wrote the letter six days after Regan's affidavit.

Plaintiff has engaged in meritless litigation for 18 months over something that should have ended with the Grievance Committee.

POINT II.

The Court of Appeals decision does not conflict with any holding of this Court.

Petitioner has completely misconstrued the holdings of this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Petitioner would have to allege a "publication" of the stigmatizing material and it would have to be false, and published while petitioner was being fired or dismissed from employment to come within the grasp of the *Roth* case, *supra*. Regan was not employed by the Town of

Brookhaven and the letter to the Grievance Committee was not published outside the Committee.

Under *Monell, supra*, plaintiff would have to plead facts showing that Levy's complaint to the Grievance Committee executed Town policy, custom or procedure. Respondent maintains that the actions of the Assistant Town Attorney did not execute or implement Town policy or custom.

More importantly, however, even if plaintiff could get past the requirements established in *Monell, supra*, to establish a civil rights violation against a municipality, he must plead facts showing he has been deprived of a constitutional right.

This is where petitioner's case must fail as both Judge Misher and the Court of Appeals have unanimously agreed that the actions Regan complains of do not constitute a deprivation of constitutional rights as protected by 42 U.S.C. §1983.

If anyone has a valid claim for infringement of speech, it is Sherri Ann Levy, not Edward Regan. The Town has been sued solely for her exercise of her obligations and rights as an attorney to complain to the local Bar Association about the conduct of another attorney during litigation.

Finally, Regan's claim that his case is one of public importance is ludicrous. He has imagined the claimed civil rights violations and fraud alluded to in his petition. He has been rebuffed at every stage of this litigation and informed that his case is frivolous. To continue this case by seeking certiorari is an incredible waste of the time and

money of the respondent, the Courts and taxpayers and respondents will seek attorneys' fees based upon Regan's continued prosecution of something that is frivolous and should have been dropped in 1982.

Conclusion.

The petition for a writ of certiorari should be denied with costs and attorneys' fees to be paid to the respondent.

Respectfully submitted,

CURTIS, HART & ZAKLUKIEWICZ
Attorneys for Respondent
124 N. Merrick Avenue
Merrick, NY 11566
(516) 623-1111

EDWARD J. HART &
BRIAN W. MCELHENNY

On the Brief